

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**CRIMINAL NO. 2:15-CR-22-KS-MTP**

**FRANK MCAFEE**

**ORDER**

On April 12, 2016, Defendant Frank McAfee pleaded guilty to conspiracy to possess 500 grams or more of methamphetamine and 500 grams or more of cocaine hydrochloride with intent to distribute, in violation of 21 U.S.C. § 846. On July 8, 2016, the Court sentenced him to 25 years of imprisonment followed by 7 years of supervised release. On January 7, 2021, Defendant filed a Motion for Compassionate Release [138] pursuant to 18 U.S.C. § 3582(c)(1)(A) because of the COVID-19 pandemic, although he is not due to be released until January 2037.

First, to the extent Defendant seeks it, the Court does not have the authority to order home confinement. *See United States v. Sherrill*, 2021 WL 214684, at \*3 (S.D. Miss. Jan. 21, 2021) (citing 18 U.S.C. § 3621(b); *United States v. Dysart*, 66 F. App'x 526, 2003 WL 21018298, at \*1 (5th Cir. 2003)).

As for a reduction of Defendant's sentence, 18 U.S.C. § 3582 permits the Court to reduce a term of imprisonment after considering the factors set forth in 18 U.S.C. § 3553(a), if it finds that "extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements

issued by the Sentencing Commission . . . .” 18 U.S.C. § 3582(c)(1)(A). Defendant has the burden of demonstrating that he meets the requirements for compassionate release. *United States v. Whirl*, 2020 WL 3883656, at \*1 (S.D. Miss. July 9, 2020).

The Sentencing Commission’s guidelines provide, in relevant part, that the Court may reduce a term of imprisonment, after considering the factors set forth in 18 U.S.C. § 3553(a), if (1) “[e]xtraordinary and compelling reasons warrant the reduction;” (2) “[t]he defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g);” and (3) “[t]he reduction is consistent with this policy statement.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.13. The Sentencing Commission’s application notes provide that an “extraordinary and compelling reason” exists if “[t]he defendant is suffering from a terminal illness . . . .” U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n. 1(A)(i). Likewise, the standard is met if:

The defendant is

- (I) suffering from a serious physical or medical condition,
- (II) suffering from a serious function or cognitive impairment, or
- (III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n. 1(A)(ii). The notes also provide that certain circumstances related to the defendant’s age and family

circumstances can meet the standard. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n. 1(B)-(C).

The policy statement also contains a catch-all provision that the Bureau of Prisons may determine whether there is some other “extraordinary and compelling reason” other than those in subdivisions (A) through (C). U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n. 1(D). The Fifth Circuit has declined to weigh in as to whether the catch-all provision “delegates only to the Bureau of Prisons.” *United States v. Thompson*, --- F.3d ---, 2021 WL 37493, at \*2 n. 4 (5th Cir. Jan. 5, 2021). This Court, however, defers to the plain language of the policy statement, which delegates the authority to determine whether such “other reasons” exist to the Bureau of Prisons. *See, e.g. United States v. Garcia*, 457 F. Supp. 3d 651, 655-56 (C.D. Ill. 2020) (policy statement provision requiring “catch-all” to be determined by BOP was not overridden by First Step Act).

Defendant argues that the COVID-19 pandemic constitutes an extraordinary and compelling reason to reduce his sentence. He is currently incarcerated at Williamsburg FCI in Salters, South Carolina. Defendant represented in briefing that as of March 26, 2021, there were at least twelve active cases of COVID-19 at his facility. The Government represented in its brief that, as of January 19, 2021, there were 34 inmates with confirmed cases of COVID-19 in Williamsburg, that 100 inmates had recovered from the virus, and that 1 inmate had died.

Defendant generally argues that he is unable to effectively avoid exposure to

the virus because of the conditions of confinement in the facility, and that he is at a higher risk of death because he has preexisting medical conditions of diabetes, hypertension, and high cholesterol. He argues that he would not pose a danger to the safety of any person or the public if he is released, citing BOP rehabilitation courses he has completed since he was incarcerated, including a drug abuse education course. Defendant also argues that he has support from his family and the broader community, citing letters of support submitted with his motion. Defendant represents that he would live with his family in Bassfield, Mississippi if released.

The Court finds that Defendant has not demonstrated that there is an “extraordinary and compelling” reason to reduce his term of imprisonment. Defendant has not articulated a “serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correction facility and from which he or she is not expected to recover.” *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n. 1(A). Courts in this Circuit have found that defendants who are not suffering from a terminal illness, a serious physical or medical condition that diminishes their ability to care for themselves, serious functional or cognitive impairment, or deteriorating physical or mental health because of aging do not meet the standard imposed by the Sentencing Commission’s policy statements. *See, e.g. United States v. Takewell*, 2020 WL 4043060, at \*3 (W.D. La. July 17, 2020); *United States v. Washington*, 2020 WL 4000862, at \*5 (E.D. La. July 15, 2020); *United States v. Clark*, 2020 WL 1557397, at

\*4 (M.D. La. Apr. 1, 2020); *United States v. Vasquez*, 2020 WL 3000709, at \*3 (S.D. Tex. June 2, 2020); *United States v. Johnson*, 2020 WL 3962284, at \*3 (S.D. Tex. July 13, 2020); *United States v. Dodd*, 2020 WL 3893695, at \*4 (E.D. Tex. July 10, 2020); *United States v. Reeves*, 2020 WL 3895282, at \*3 (N.D. Tex. July 10, 2020); *Whirl*, 2020 WL 3883656 at \*3. “Preexisting medical conditions that place a defendant at increased risk for serious illness from COVID-19 are not in and of themselves sufficient to establish extraordinary and compelling reasons justifying a reduction in sentence.” *United States v. McLin*, 2020 WL 3803919, at \*3 (S.D. Miss. July 7, 2020).

Additionally, Defendant’s “general concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and compelling reasons for a reduction in sentence . . . .” *Takewell*, 2020 WL 404360 at \*4. “[T]he mere existence of COVID-19 in society” and, consequently, the prison system “cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.” *United States v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020) (citing BOP’s COVID-19 Action Plan).

The Court also finds that Defendant has not demonstrated that he would not present a danger to the safety of any other person or to the community if released. Defendant received a 25-year sentence because of the severity of his crimes and his criminal history. Defendant attempted to flee from officers during a traffic stop performed while he was under surveillance for suspected drug-trafficking activities, and he resisted arrest when they caught him. The officers found a kilogram of cocaine

in his car. After arresting Defendant, agents obtained a search warrant and found three pounds of crystal methamphetamine and five ounces of cocaine in Defendant's co-conspirator's home. The co-conspirator claimed that Defendant had given him the drugs for storage. When agents interviewed Defendant, he admitted to transporting drugs for a supplier in Texas, who was working for someone else in Mexico. He described "test runs" transporting drugs from Houston, Texas, to New Orleans, Louisiana, as well as numerous other drug transactions. In all, Defendant was responsible for conspiring to possess with intent to distribute over 135 kilograms of cocaine, 16 kilograms of methamphetamine, and 782 kilograms of "ice." Additionally, Defendant has prior convictions of simple assault on a police officer and possession of cocaine with intent to distribute, and he was involved in a domestic altercation in May 2015, in which he allegedly shot a person.

In summary, the Court certainly takes the COVID-19 pandemic seriously, but it "cannot release every prisoner at risk of contracting COVID-19 because the Court would then be obligated to release every prisoner." *United States v. Koons*, 2020 WL 1940570, at \*4 (W.D. La. Apr. 21, 2020). The Courts that have granted compassionate release because of the pandemic "largely have done so for defendants who had already served the lion's share of their sentences and presented multiple, severe health concerns." *Thompson*, 2021 WL 37493 at \*3. "Fear of COVID doesn't automatically entitle a prisoner to release." *Id.*; see also *Koons*, 2020 WL 1940570 at \*5.

Defendant has a substantial amount of time left to serve on his sentence, and

he has not provided any good reason why he should not serve it. He conspired to traffic significant amounts of drugs, and his record includes serious, violent unindicted criminal conduct. The BOP's response to the pandemic, outlined in detail in the Government's brief, is sufficient, given the circumstances and logistical issues presented by a prison environment. For all these reasons, the Court **denies** Defendant's Motion for Compassionate Release [32].<sup>1</sup>

SO ORDERED AND ADJUDGED this 9th day of April, 2021.

/s/ Keith Starrett  
KEITH STARRETT  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup> See e.g. *United States v. Brown*, 2020 WL 6833778 (5th Cir. Nov. 20, 2020); *United States v. Jackson*, 2020 WL 6702129 (5th Cir. Nov. 13, 2020); *United States v. Rivas*, 2020 WL 6437288 (5th Cir. Nov. 2, 2020).